IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF THURSTON

WASHINGTON EMPLOYERS CONCERNED ABOUT REGULATING ERGONOMICS, ET AL.,	)	
Petitioner,	)	
vs.	)	NO. 01-2-01935-7
STATE L & I, ET AL.,	)	
Defendants.	)	

BE IT REMEMBERED that on Friday, July 12, 2002 the above-entitled matter came on for Oral Opinion by the Court before the HONORABLE PAULA CASEY, Judge of the Superior Court of the State of Washington, County of Thurston.

Carolyn M. Koinzan, KOINZCM5050W
Superior Court
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Olympia, Washington 98502
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APPEARANCES

TIMOTHY J. C'CONNELL, Attorney at Law, appearing on behalf of the Petitioner;

ELLIOTT S. FURST, Assistant Attorney General, appearing on behalf of the State of Washington;

LAWRENCE SCHWERIN, Attorney at Law, appearing on behalf of AFL CIO.

FRIDAY, JULY 12, 2002

THE COURT: Good morning. We are back after the June 28th argument in this matter. This case, of course, comes before the Court on a challenge to the ergonomics rule issued by the Department of Labor and Industries in May of 2000.

As counsel well know, a 100,000 page rule-making record was transmitted to the Court in regard to this rule challenge, but the parties themselves designated a much smaller portion of the record for me to review. I have, of course, reviewed the designated part of the record as well as the briefing and heard the oral arguments on June 28.

Today I'm going to discuss the standard of review to be applied to this rule-making review. I'm going to discuss the procedural challenges to the timeliness of the filing of the cost/benefit analysis and the implementation plan; I will discuss whether the Department of Labor and Industries has authority to regulate workplace risk factors that cause or contribute to musculoskeletal disorders; I'll discuss whether epidemiological studies may be relied on for these rules; I'll discuss the sufficiency of the cost/benefit

analysis and the implementation plan.

I will apologize both to counsel and those of you who are spectators that I'm going to stumble over the word epidemiological many times in today's hearing. Can counsel just say the word one time for me?

MR. O'CONNELL: Epidomiological.

MR. FURST: I concur.

THE COURT: First I'll address the standard of review.

RCW 34.05.570(2)(c) addresses the standard of review in a proceeding involving a review of the rule. It declares that the Court shall declare the rule invalid only if it finds that the rule violates constitutional provisions; the rule exceeds the statutory authority of the agency; the rule was adopted without compliance with statutory rule-making procedures; or the rule is arbitrary and capricious. It is my belief and my finding that this statute governs the Court's review of rule making.

However, of course, there is more to the Court's review of a rule. RCW 34.05.328 sets forth requirements that must be complied with in adopting significant legislative rules, which of course this is. In subsection (1) the statute provides that before adopting a rule, an agency shall clearly state in detail

the general goals and specific objectives of the statute that the rule implements; determine that the rule is needed to achieve the general goals and specific objectives stated under (a) of this subsection, analyze the alternatives to rule-making and the consequences of then not adopting the rule; determine that the probable benefits of the rule are greater than is probable cost, taking into account both the qualitative and quantitative benefits and costs and the specific directives of the statute being implemented; determine, after considering alternative versions of the rule and the analysis required that the rule being adopted is the least burdensome alternative for those required to comply with it that will achieve the general goals and objectives under this section; and determine if the rule differs from any federal regulation or statute applicable to the same activity or subject matter, and, if so, determine that the difference is justified.

In subsection (2) the statute goes on to provide that the agency shall place in the rule-making file documentation of sufficient quantity and quality so as to pursuade a reasonable person that the determinations are justified.

So, while court review generally is governed by the arbitrary and capricious standard, the Court must

also make sure that the statutory rulemaking procedures are complied with, and, specifically, that the requirements of RCW 34.05.328 were complied with to the extent that they have been challenged.

In this case, the first major procedural challenge brought by the petitioners is that the Department failed to have the cost/benefit analysis required by RCW 34.05.328 completed and available for public comment prior to the rule's adoption.

RCW 49.17.040 sets forth requirements of public notice of rule making for the industrial health and safety. This statute requires publication of the general subject matter of the proposed rules and information for locating copies of proposed rules in order to receive public comment.

RCW 34.05.320 and 325 are the Administrative Procedures Act directives governing public participation in rule making. These provisions require publication of proposed rules, prior to rule making hearings, together with information, including, among other specifics, agency comments on implementation and fiscal matters. The agency also has the obligation to assure that information published is accurate.

In the case of this ergonomics rule, a brief economic summary, including background discussion and

methods used to analyze costs and benefits, was published with the proposed rule in November 1999 and was available for comment.

Public comments on the cost/benefit analysis are summarized in Appendix D to the Concise Explanatory Statement. The comprehensive cost/benefit analysis however was filed later contemporaneous with the adoption of the rule in May of 2000.

Although it seems to me that it would be preferable to have the thorough cost/benefit analysis of a proposed rule required by RCW 34.05.328 available for consideration during the period of public comment, nothing in the statute specifically requires that that cost/benefit analysis be completed and available prior to the public comment.

In this case, there was in fact public notice of the general cost/benefit analysis of the Department. There was, in fact, public comment on the costs and benefits. The rule gave rise to concerns about costs of implementation and these were specifically addressed in the comment period without the Department's publication of its complete cost/benefit analysis. The Department considered these comments in its final cost/benefit analysis. Whether the documentation concerning costs and benefits placed in the rule making file was

sufficient to meet the requirements of RCW 30.05.328(2) is a separate question. In any case, I do not find that the rule making process was defective due to the timing of the filing of the cost/benefit analysis.

Petitioners next argue that the rules Implementation Plan also was not timely filed. Like the cost/benefit analysis, the implementation plan was filed contemporaneous with the rule's adoption in May of 2000. My analysis of this issue is similar to the last one. RCW 34.05.328(3) requires an implementation plan to be placed in the rule making file before the rules are adopted. This requirement was met. I'll address the challenge to the sufficiency of the implementation plan separately.

Petitioners have challenged whether the Department is authorized to regulate work-related musculoskeletal disorders, or, at least, they argue that musculoskeletal disorders resulting from workplace factors are not encompassed in the Department's authority in RCW 49.17.050. That statute requires the Director of the Department of Labor and Industries to promulgate health and safety standards and to control conditions in workplaces for "gasses, vapors, dust or other airborne particles, toxic materials, or harmful physical agents, and to set a standard which most

adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity, even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life."

The Department and intervenor argue that "harmful physical agents," the language of the statute, give rise to the MSDs. Petitioners argue that what gives rise to MSDs is not a harmful physical agent. I'm not sure who is correct about the meaning of harmful physical agents, but I do analyze the Department's authority to regulate workplace factors contributing to musculoskeletal disorders differently.

The purpose of the Industrial Safety and Health Act of Washington is stated in RCW 49.17.010 to create, maintain, continue and enhance the industrial safety and health program of the state. The Director of the Department of Labor and Industries is directed by RCW 49.17.040 to adopt rules and regulations governing safety and health standards for conditions of employment.

RCW 49.17.050 (where the harmful physical agent language is found) has more specific directives to the Director of Department of Labor and Industries.

I am satisfied that the Department has authority under section 010 and 040 to regulate the conditions of the workplace for the health and safety of workers and that includes those workplace conditions causing or contributing to MSDs. I find that analysis under section 050 is really unnecessary to determine the Department's authority to regulate.

Regardless of whether 050 is the source of authority for the regulation, it was my understanding from the argument that the Department seems to agree that its rule making decision must be based upon the "best available evidence," which is language that is found in 050 and so that too will be a basis for considering the appropriateness of these rules.

Petitioners next argue then that the Ergonomics Rules is not based upon the best available evidence. Petitioners' primary argument is that epidemiological studies are not the type of scientific evidence required to analyze the need for these rules. I have learned that epidemiology studies the incidence and distribution of diseases or injuries in populations and draws conclusions based on statistical associations between exposure and outcome.

Petitioners argue that superior scientific method would involve random controlled trials and that

random controlled trials are the best evidence and should be used to support this type of rule making. Petitioners point to some specific random control trials that they argue do not support the Department's conclusion that these rules are needed or that these rules would accomplish the Department's goals.

First, let me say that it does not appear that any court has determined that random controlled trials are necessary for determining the need for industrial health and safety regulations. Courts, including the Washington courts in the Aviation West tobacco smoke case, have allowed the use of epidemiological studies to support workplace regulations, particularly with respect to cancer-related causes.

In this rule making, the Department reviewed hundreds of epidemiological studies. The Department relied on conclusions of the National Academy of Science Symposium, which was a symposium of apparently 74 scientists and the National Institute of Occupational Safety and Health review of hundreds of epidemiological studies. The individual studies vary in their conclusions. Many show an association between MSDs and work-related physical factors when there are high levels of exposure. The Department also considered specific random controlled trials that were identified by

petitioners but came to different conclusions about the relationship between the results of those trials and these rules.

I am satisfied that the epidemiological studies are appropriate scientifically based studies to use in determining the need for workplace regulations. Epidemiological studies and the few random controlled trials that have been done, together are the best available evidence of the relationship between musculoskeletal disorders and working conditions.

The petitioners further argue with respect to the scientific basis for the adoption of these rules that the Department failed to make a dose-response analysis. The Concise Explanatory Statement outlines the reasoning of the Department in analyzing the epidemiological studies and the workplace variables of amount, intensity, duration and frequency of the physical risk factors in the workplace. These studies formed the basis for the specific ergonomics rules related to specific types, amounts and duration of physical risk factors in the workplace and the Department's analysis that reducing exposures as the rules require will reduce the incidence of injuries to exposed workers.

I find that the Department was not arbitrary

and capricious in its consideration of the random controlled trial evidence referenced by the petitioners in its reliance on the available epidemiological data and the Department's own workplace injury data, (including statistics that show over 50,000 workers claims for WMSDs each year), or in its analysis of how specific reductions in exposure to physical risk factors would reduce the incidence of MSDs in the workplace. It is not my job to determine whether another person or another agency conducting the analysis could have or would have reached a different conclusion.

I'm now going to return to the petitioner's challenge to the sufficiency of the cost/benefit analysis. I believe that this is perhaps the most difficult analysis for the Court to make. The written cost/benefit analysis is a 63-page document with references and survey questions attached.

With respect to costs, the Department relied on employer survey data and a federal OSHA study to determine the costs of implementing the rule. The petitioners have argued that the Department's survey was flawed in that the queries about workplace risk exposures are not the same as the physical risk factor exposures that were finally adopted in the Department's rule. Petitioners argue that the employer response rate

was low.

The Department has countered that there was an unusually high response rate to the survey, in fact, thousands of employers provided input about exposure in their workplaces. The Department argues that discrepancies between the survey questions and the regulation would cause the cost estimates to be higher than they actually will be under the rule that was finally adopted.

Petitioners also argue that the Department has relied too heavily on the OSHA study to determine exposure data and unit cost estimates for compliance with the ergonomics rule because the OSHA rules being considered were markedly different than the rule adopted in Washington.

The Department counters that although the OSHA regulations differed, the unit cost estimates for particular ergonomic controls are still a valid basis for this analysis and are based upon judgments of experts in the field.

With respect to benefits, the Department's own workers compensation claim costs were analyzed. Epidemiological data and reports of 63 ergonomic programs that have been implemented were also analyzed to determine what injuries, and, therefore, what

percentage of claims would be avoided by implementing ergonomic regulations.

Petitioners criticize the extrapolations done from the local data and question the basis for the estimates of injury avoidance. The Department asserts that the risk reduction estimates are based on the literature which showed a 50 percent reduction but only a 40 percent figure was used by the Department to compute economic savings.

All of this analysis led the Department to the conclusion that the costs of implementation would be around $80 million a year and that the economic benefits would be around $340 million a year. The projected economic benefits in the department's analysis outweighs economic costs by 4 to 1. This analysis certainly does provide a large margin for error before the Department's conclusion that benefits outweigh costs would be overcome.

In addition, the Department expects there would be qualitative social benefits, which the statute requires to be considered. They would include a healthier work force and a healthier quality of life by reducing those negative factors that are known to accompany work-related musculoskeletal disorders such as living with pain, living with depression, reduced

long-term earning potential, and loss of family stability. The Department also cites employer benefits such as less absenteeism, less turnover, fewer training costs and better productivity.

I am sure that there are many ways of looking at the data, of adjusting, of extrapolating, of discounting. There is no certainty in any of the projections that have been made. However, I conclude that the Department did accumulate documentation of sufficient quantity and quality to support its conclusion and I conclude that the Department was not arbitrary and capricious to conclude that the benefits of this rule outweigh its costs.

Finally, the petitioners challenge the sufficiency of the implementation plan. RCW 34.05.328(3) requires putting an implementation plan in the rule making file at the time before adopting the rule. The plan must address how the agency plans to implement and enforce the rule, including a description of the agency resources to be used; how the agency plans to inform and educate people about the rule; how the agency plans to promote and assist involuntary compliance; and to evaluate and to plan on how the Department will evaluate whether the rule achieves its purpose.

The Department's implementation plan addressed each of the four issues required by the statute and the Department was not arbitrary and capricious in adopting a time line for implementation of the rule or means of assisting employers and informing them about implementing the requirements of this rule.

Accordingly, I will uphold the rule making process.

Are there any other questions? I know that there were lots of smaller issues that were addressed in the briefing and are there other issues that needs to be addressed in this ruling?

MR. FURST: I don't have anything, Your Honor.

MR. O'CONNELL: Nothing further, Your Honor.

THE COURT: Would you like to just agree among yourselves as a time for presentation on a Friday motion calendar or would you like me to set one here in court.

MR. FURST: I think we can reach an agreement.

MR. O'CONNELL: We should discuss that amongst ourselves, Your Honor.

THE COURT: Best time would be a Friday motion calendar.

MR. FURST: Thank you, Your Honor.

(Proceedings concluded.)

C E R T I F I C A T E

STATE OF WASHINGTON)
) ss
COUNTY OF THURSTON)

I, Carolyn M. Koinzan, Official Reporter of the Superior Court of the State of Washington, in and for the county of Thurston, do hereby certify:

That the foregoing pages compromise a true and correct transcript of the proceedings held in the above-entitled matter, as designated by Counsel to be included in the transcript, reported by me on the 12th day of July, 2002.

Carolyn M. Koinzan, Reporter
C.S.R. No. KOINZCM5050W